INTERIOR BOARD OF INDIAN APPEALS

Tanya Bitonti v. Alaska Regional Director, Bureau of Indian Affairs

43 IBIA 205 (08/04/2006)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

TANYA BITONTI,	:	Order Affirming Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 04-127-A
ALASKA REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	August 4, 2006

Tanya Bitonti (Appellant) seeks review of a June 17, 2004 decision of the Alaska Regional Director, Bureau of Indian Affairs (Regional Director; BIA), retroactively approving a May 24, 1994 quitclaim deed to Lot 8, Block 1, U.S. Survey 1570, Townsite of Hydaburg, Alaska, executed by Esther Nix (now deceased) in favor of Jolene Edenshaw, Nix's granddaughter. In his decision, the Regional Director also determined that an April 29, 1988 gift deed, signed by Nix, in favor of Rose Bitonti (Bitonti) (now deceased), Appellant's mother and Nix's granddaughter, for Lots 7 and 8, Block 1, U.S. Survey 1570, Townsite of Hydaburg, Alaska, was invalid because it was never approved by BIA. Appellant identifies herself as the successor-in-interest to Bitonti's estate 1/, and argues on appeal that in 1988 BIA approved the 1988 gift deed conveying Lots 7 and 8 to Bitonti, and that the Regional Director therefore lacked authority to retroactively approve the May 24, 1994 quitclaim deed in favor of Edenshaw. For the reasons stated below, we affirm the Regional Director's decision to retroactively approve the 1994 deed.

Background

Nix was an enrolled member of the Tlingit and Haida Indian Tribes of Alaska (Tribe). On July 1, 1977, Nix received Native restricted title to Lots 7 and 8, Block 1, U.S. Survey 1570, Townsite of Hydaburg, Alaska, pursuant to the Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629, formerly codified at 43 U.S.C. § 733 (1970).

1/ Bitonti died on June 10, 1996, apparently leaving several surviving children, including Appellant. For the purposes of this appeal, we assume that Appellant is a possible successor-in-interest to her mother's estate.

On June 24, 1987, Nix executed a warranty deed purporting to convey Lot 7 to Bitonti for $10 consideration. The warranty deed was not submitted to or approved by BIA. Apparently after learning that the deed was ineffective without BIA's approval, on April 29, 1988, Nix completed a BIA "Application for the Conveyance of Native Land" for Lots 7 and 8 in favor of Bitonti. 2/ The application stated that the reason for the gift conveyance was that Nix "wish[ed] to gift deed the land to [her] granddaughter, Rose Bitonti." The application included a line for the signature of the Superintendent, Southeast Alaska Agency, next to the words "Application hereby recommended for approval," and a line for the signature of the Area Director next to the words "Application hereby ap[p]roved." Also on April 29, 1988, Nix executed a gift deed in favor of Bitonti for Lots 7 and 8. The gift deed provided that the consideration for the conveyance was "love and affection." Nix and Bitonti signed the gift deed, which included a line for the Area Director's signature.

Nix submitted both the gift deed application and the gift deed to the Central Council of the Tribe, and the Central Council then submitted both documents to BIA for processing at a date not disclosed in the record.

Sometime in the spring or summer of 1988, construction began on a house for Bitonti on Lot 7, funded through BIA's Housing Improvement Program (HIP). 3/ On September 20, 1988, a housing program specialist for BIA performed a final inspection of the house and advised Bitonti that she could move in. On October 25, 1988, the Superintendent signed Bitonti's HIP grant agreement.

2/ The Tribe had contracted realty functions from BIA under the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638. By letter dated March 24, 1988, John Brower, a realty officer for the Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council), had advised Bitonti that she should have Nix complete an application for a gift deed and a gift deed for the property she wished to convey, and attached both documents to the letter.

3/ Numerous documents in the record refer to Bitonti's HIP house as being constructed on Lot 8. The Regional Director's decision states that Bitonti's house was, in fact, built on Lot 7, and that the record is "replete with erroneous references" confusing the two lots. Regional Director's Decision at 2 n.1. Appellant does not dispute on appeal that Bitonti's house was constructed on Lot 7.

Meanwhile, BIA processed Nix's April 29, 1988 gift deed application. On May 19, 1988, Glenda Miller, a realty officer at the Agency, requested an appraisal of Lots 7 and 8. The appraisal was completed on October 25, 1988 and approved by BIA's Chief Appraiser on November 30, 1988. Also on October 25, 1988, the Superintendent signed a copy of Nix's gift deed application on the line for the Superintendent's signature, next to the words "Application hereby recommended for approval." 4/ The Area Director never signed the application for gift deed or the gift deed. On December 20, 1988, a BIA archeologist gave tentative clearance for the gift deed transaction.

On January 12, 1989, Mike Corpuz, a Central Council realty specialist, spoke to Nix. Corpuz's contact report for the conversation indicates that Nix told Corpuz that "she does not wish to deed her lots to Rose Bitonti." Another contact report, dated January 20, 1989, indicates that Corpuz called Bitonti and notified her that Nix wanted to cancel the gift deed transaction and that the gift deed would be "put * * * on hold for now." In a contact report dated February 13, 1989, summarizing a conversation with Nix, Brower noted that Nix was a "firm 'No Way.' [Nix] will allow Bitonti to live on the property but in no way will she gift the land to her."

By letter dated February 23, 1989, Brower advised the Superintendent that Nix had changed her mind about the gift deed transaction. He stated that Nix told his office that she no longer wished to gift deed the land to Bitonti, and that Nix expressed "recent displeasure with the lack of care and concern that [Bitonti] had regarding [Nix's] health." Brower reported that he "assured [Nix] that the matter was closed and the ownership of the land is to remain in her name," and that his office "will not be processing this gift deed transaction." Brower also wrote to Bitonti on February 23, 1989 to notify her of the Central Council's intention to stop processing the gift deed application because Nix had changed her mind about the transaction and to inform her that the property she lived on "still belongs to [Nix]."

The Central Council and BIA then apparently attempted to address the fact that Bitonti was living in the HIP house located on Nix's land. In a memorandum dated August 29, 1989, Corpuz reported to Brower that he had met with Nix "to resolve the trespass problems," and that Nix stated it was her wish to lease Lot 8 (apparently actually

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4/ On July 29, 1988, the Regional Director issued Memorandum Release No. RE 88-306, which delegated authority to Superintendents to approve gift conveyances. It appears that the Superintendent was not aware of this delegation of authority at the time she signed the gift deed application.

Lot 7) to Bitonti and sell Lot 7 (apparently actually Lot 8) to another individual, Frank Natkong, who was believed to have constructed a mechanic's shop encroaching on Lot 8. Corpuz attached to the memorandum copies of applications, dated August 2, 1989 and signed by Nix, to lease Lot 8 (Lot 7) at a reasonable rate 5/, and to sell Lot 7 (Lot 8) to Natkong. There is no evidence in the record that these transactions were ever completed.

On May 24, 1994, Nix executed a quitclaim deed purporting to transfer her interest in Lot 8 to another granddaughter, Jolene Edenshaw. The quitclaim deed provided that the consideration for the conveyance was "love and affection." The deed was recorded by the Ketchikan Recording District that same day. The deed did not contain a line for BIA's approval, nor was it submitted to BIA for approval. Nix apparently sent the deed to the Central Council, and the deed was then returned to her, unchanged. Edenshaw apparently constructed a house on Lot 8 in the summer of 1994. See Sept. 16, 2003 letter from Edenshaw to Regional Director.

Bitonti died on June 10, 1996. At some point following Bitonti's death, Appellant moved into the house on Lot 7.

On July 2, 2001, the Tlingit-Haida Regional Housing Authority (Housing Authority) forwarded to BIA a copy of the April 29, 1988 gift deed that Appellant had apparently sent to the Housing Authority with a request that the Housing Authority "help her get the Deed in her name." On March 20, 2002, Appellant sent a fax to Jim Steele, a BIA realty specialist, in which she stated, "[t]his is the information you will need to start the process on Lot (7) and lot (8) * * * on the Bitonti Nix deed." Appellant attached a copy of a March 5, 2002 title report from a title company for Lots 7 and 8, which referred to both the 1988 and 1994 gift deeds, but noted that neither gift deed was valid because neither had been approved by BIA. On April 8, 2002, Edenshaw faxed to Jim Steele a copy of the May 24, 1994 quitclaim deed. By letter dated April 12, 2002, Steele requested that Nix inform him as to whether she still wished to gift deed Lots 7 and 8 to either Bitonti or Edenshaw.

Nix died on April 13, 2002.

On April 24, 2002, Robert M. Norton of Ketchikan Title Agency wrote to Edenshaw, apparently at her request. He stated that he specifically recalled Edenshaw and

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5/ Nix's application for lease indicated that she understood that the lease would need to be a long term lease of 20 years.

Nix being at his office around the time the 1994 quitclaim deed was executed. He recalled Nix's "desire to transfer Lot 8, Block 1, to [Edenshaw] during [Edenshaw's] visit to [his] office."

In a fax dated February 25, 2003, counsel for Appellant advised Steele of "the need for BIA to probate Ms. Nix's estate, including the invalidly-transferred real property," referring to Nix's 1994 purported conveyance to Edenshaw. Several months later, on June 24, 2003, Edenshaw wrote to BIA requesting that BIA "retroactively transfer the property title [to lot 8] to [her] name and legally acknowledge [her] ownership of [Lot 8.]"

On September 12, 2003, Edward Thomas, the president of the Central Council, wrote to the Regional Director to summarize the Central Council's involvement in the gift deed transaction between Nix and Edenshaw. He stated that he "personally spoke with [Nix] on the property transfer to [Edenshaw] and she fully understood the importance of the transfer and she was grateful for the assistance our HIP provided to [Edenshaw] in getting [a HIP house built for Edenshaw.] I believe that [Nix] fully intended to permanently give this property to her granddaughter." Sept. 12, 2003 letter from Thomas to Regional Director. He explained that the Central Council realty program started the application process to have Lot 8 conveyed to Edenshaw but that the Hydaburg Cooperative Association took over the operation of the BIA realty program before the gift deed transaction was complete.

On September 16, 2003, Edenshaw wrote to the Regional Director and again requested that BIA "do a retroactive deed" on Lot 8. Id. She stated in her letter that after she sent a copy of the May 21, 1994 quitclaim deed to the Tribe, she received a letter saying that the Tribe had received all the "papers" and that "everything is in order," and that she subsequently received housing assistance funds and built a house on the property. Id. She stated that she therefore assumed that the gift deed transaction had been finalized. She further stated that she "had no idea certain procedures were not done in 1994 when the gift deed was filed, notarized and sent to [the Tribe]." Sept. 16, 2003 letter from Edenshaw to Regional Director at 2.

In response to Edenshaw's request, on June 17, 2004, the Regional Director issued the decision that is the subject of this appeal. Before reaching the question of whether he should retroactively approve the 1994 quitclaim deed, however, he first considered whether Nix still had any title to convey in 1994 — i.e., whether she had already conveyed Lots 7

and 8 to Bitonti through the April 29, 1988 application for gift deed and gift deed. 6/ The Regional Director concluded that the deed had never been approved by BIA and thus title never passed to Bitonti. He further noted that Nix had withdrawn her request for approval of the gift deed during her January 12, 1989 and February 13, 1989 telephone conversations with Corpuz and Brower. The Regional Director also noted that Nix's subsequent actions, including her completion of applications to lease Lot 7 (actually Lot 8) and sell Lot 8 (actually Lot 7) in 1989, and her execution of the 1994 quitclaim deed to Edenshaw for Lot 8 "were fully consistent with her unambiguously expressed change of heart" and "indicat[ed] her understanding that the previously requested gift transaction had been effectively halted." Regional Director's Decision at 6. He then concluded that "[b]ased on the totality of these circumstances, * * * Esther Nix was still the owner of Lot 8 in 1994." Id. at 7.

Once he determined that Nix still owned Lot 8 at the time of the May 24, 1994 quitclaim deed, the Regional Director then turned to the issue of whether retroactive approval of the 1994 quitclaim deed to Edenshaw was appropriate. On the basis of Edenshaw's representations and the letters from Norton and Thomas, the Regional Director concluded that Nix "knowingly execute[d] the deed in favor" of Edenshaw. Id. at 8. He noted that nothing in the record suggests that Decedent changed her mind, "in marked contrast to Ms. Nix's conduct after executing the 1987 and 1988 deeds in favor of [Bitonti]," id., and that Nix's acquiescence to the construction of Edenshaw's home on the property and to Edenshaw's occupancy of the home were consistent with "a belief and intention that she had transferred ownership to [Edenshaw]." Id. The Regional Director concluded that the conveyance met the requirements of 25 C.F.R. § 152.25(d) 7/, and

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6/ The Regional Director determined that the June 24, 1987 warranty deed purporting to convey Lot 7 to Bitonti was a "legal nullity" because the deed was not submitted to or approved by BIA. Regional Director's Decision at 5. Appellant does not dispute this determination.

7/ 24 C.F.R. § 152.25(d) provides that:

> With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

granted Edenshaw's request for retroactive approval of the 1994 quitclaim deed for Lot 8. He therefore concluded that Lot 8 should be excluded from Nix's probate inventory, but that Lot 7 should be included in the inventory because Nix's interest in Lot 7 "was never effectively disposed of." Id. at 10. 8/

Appellant appealed to the Board. Appellant and the Regional Director filed briefs. 9/

Discussion

The regulations governing conveyances of trust or restricted land require that an application for a gift deed conveyance of trust or restricted land must be approved by the Secretary or his delegate. See 25 C.F.R. § 152.23; see also Estate of Joseph Baumann, 43 IBIA 127, 136 (2006). BIA's decision to approve or deny an application is one committed to the discretion of BIA. See Barber v. Western Regional Director, 42 IBIA 264, 266 (2006). BIA's discretion includes the ability to retroactively approve a conveyance after the death of the Indian grantor. See Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 21, 32 (1982).

Lot 8

On appeal, Appellant argues that the Regional Director erred in retroactively approving the 1994 quitclaim deed to Edenshaw because: (1) the Superintendent's signature on Nix's April 29, 1988 gift deed application constituted binding approval of the gift conveyance and therefore Nix no longer possessed title to Lot 8 in 1994; (2) "equitable principles" prevent Nix and BIA from asserting that the 1988 deed was invalid; and (3) retroactive approval of the 1994 deed constituted an unconstitutional "taking" of Appellant's property interest without due process. We address each issue in turn.

8/ Although the Regional Director acknowledged that Nix "appear[ed] to have acquiesced in the commencement of construction" of a house on Lot 7, he concluded that Nix later "withdrew her request before the critical approval was formally given." Id. at 5.

9/ On August 22, 2005, the Board stayed further proceedings pending settlement efforts by the parties, but these efforts were unsuccessful. The Board then reinstated the briefing schedule on February 10, 2006.

Appellant first contends that the Superintendent's signature on Nix's April 29, 1988 gift deed application "constituted binding approval of that Gift Deed." Reply Brief at 7. Appellant points out that Memorandum Release No. RE-88-306 delegated authority to the Superintendent to approve gift deeds as of July 29, 1988, and therefore, when the Superintendent signed the application on October 25, 1988, recommending approval of the application, her signature actually amounted to approval of "the gift conveyance." Opening Brief at 8. Appellant describes the fact that the Superintendent did not actually sign the gift deed itself as "solely a ministerial mistake based on her ignorance, [that] does not invalidate the executed deed." Id. at 9. Accordingly, Appellant argues that when Nix "alleged[ly]" told Central Council's realty staff that she had changed her mind 10/, "it was too late for Ms. Nix or the BIA to deprive Rose Bitonti of her gifted land. Lots 7 and 8 then no longer belonged to [Nix]." Id. at 8.

We disagree. As noted above, BIA regulations specifically require Secretarial approval of an application for a gift deed conveyance of trust or restricted land. See 25 C.F.R. § 152.23; see also Estate of Baumann, 43 IBIA at 136. Here, although the Superintendent had been delegated authority, under Memorandum Release No. RE 88-306, to approve the 1988 application executed by Nix to gift deed Lots 7 and 8 to Bitonti, the parties do not dispute that she was unaware that she had this authority and that she signed the application next to the "recommended for approval" line of the application. Thus, regardless of the authority the Superintendent possessed, the only authority she exercised was to make a recommendation to the Regional Director, which, although unnecessary, was well within her right.

Further, even if the Superintendent's signature was treated as an exercise of her authority to approve the gift deed application, such approval of the application did not constitute final approval of the deed, which was unsigned by BIA. In addition to 25 C.F.R. § 152.23, other sections of 25 C.F.R. Part 152 broadly require Secretarial approval of the conveyance of trust or restricted land, not merely the application that precedes the conveyance. See e.g., 25 C.F.R. §§ 152.22(a) (requiring all conveyances of individually owned trust or restricted lands to be approved by the Secretary of the Interior) and 152.17

10/ Appellant appears to suggest that Nix never told Corpuz or Brewer that she had changed her mind about the gift deed transaction, despite the contact reports included in the administrative record. To the extent Appellant suggests that simply asserting doubt about the documentation in the record concerning Nix's state of mind warrants further proceedings by BIA or a hearing, we disagree. Appellant has proffered no contradictory evidence that would create a material issue of fact regarding Nix's state of mind.

(requiring Secretarial approval for any sale, exchange, or conveyance by an Indian owner of trust or restricted lands). Moreover, subsection 152.25(d), which governs gift conveyances, states broadly that all such conveyances require the approval of the Secretary. We further note that the Regional Director's 1988 delegation of authority to Superintendents to approve gift conveyances specifically requires approval of both the gift deed application and the actual gift deed. See Memorandum Release No. RE-88-306.

In recognition of the regulatory requirements requiring Secretarial approval of the conveyance of trust or restricted land, the Board recently held that an approved gift deed application itself is insufficient to convey title. Estate of Baumann, 43 IBIA at 137. In Estate of Baumann, the grantor never executed an actual gift deed. We therefore did not reach the issue presented here — i.e., whether an approved gift deed application, together with a gift deed signed by the grantor, but not approved by BIA, can satisfy the requirements under the regulations for Secretarial approval of a conveyance, and thereby convey title. We now hold that it does not. 11/

We therefore conclude that the Superintendent's recommendation to approve the gift deed application did not constitute the exercise of delegated authority to actually approve the application. We further conclude that even if it did, it did not constitute actual approval of the deed itself. We therefore hold that the Regional Director correctly concluded that the 1988 gift deed application in favor of Bitonti and gift deeds to Bitonti for Lots 7 and 8 were without effect, and therefore Nix retained title in 1994 when she executed the quitclaim deed to Edenshaw for Lot 8.

Appellant next argues that "equitable principles prevent [Nix's] retraction of her completed gift conveyance," Opening Brief at 10, and "the BIA from disavowing [Nix's]

11/ Appellant relies on the fact that the Superintendent signed the HIP grant to Bitonti and recommended approval of the gift deed application on the same day to support her assertion that the Superintendent would have approved the entire conveyance had she known she had the authority. The HIP grant signed by the Superintendent, however, is not the same as an approved gift deed transferring an interest in land. Moreover, the record shows that BIA continued to process the gift deed after the Superintendent recommended the application for approval. For example, the appraisal of the lots was forwarded to BIA's chief appraiser for review, and BIA's archeologist issued his recommendation for archeological clearance of the conveyance. It is therefore clear that at the time the Superintendent signed the gift deed application, recommending its approval, BIA did not consider the entire transaction to be complete.

gift conveyance to [Bitonti]," id. at 11. Appellant states that Bitonti reasonably relied on the Superintendent's and Corpuz's signatures on the gift deed application, and the Superintendent's signature on the HIP grant, and that Bitonti "changed her life's position * * *, built a house, moved in, and invested in her property and home." Id. at 12. She argues that "[b]oth the BIA and the Central Council as the realty contractor knew, or should have known, that [Bitonti] justifiably relied on their approval of her gift-deed and their further assurances as to its validity." Id.

This argument is without merit. An Indian landowner may change her mind about a conveyance and revoke her consent at any time prior to the actual conveyance. Estate of Sandra Kay Bouttier LaBuff Heavy Gun, 43 IBIA 143, 149 (2006) (citing Barber, 42 IBIA at 266). Here, we have already concluded that the April 29, 1988 gift deed transaction was never completed. Thus, Nix remained free to change her mind. Further, we have consistently held that BIA must refrain from approving a gift deed where there is any question concerning an owner's intent. Barber, 43 IBIA at 266; Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220, 228 (1994); Estate of Evan Gillette, Sr., 22 IBIA 133, 138 (1992). 12/ In the present case, we conclude that the Central Council and BIA correctly stopped processing Nix's April 29, 1988 gift deed application once they learned that Decedent had changed her mind. Further, Appellant cites no authority to support the proposition that equitable principles can be applied against an Indian landowner to prevent her from changing her mind regarding a gift conveyance. To the extent that Appellant argues that equitable principles should apply against BIA, the Board has rejected that proposition. See e.g., State Bank of Eagle Butte v. Director, Office of Economic Development, 41 IBIA 43, 52-53 (2005).

Even if equitable principles could be applied against an Indian landowner to force her continued agreement to convey restricted property, or against BIA to approve a conveyance against the landowner's wishes, such principles would not benefit Appellant in this case. Appellant could not have reasonably relied on the Superintendent's signature on the gift deed application because the application itself represented that the Superintendent was only recommending that the Area Director approve the application, and the deed provided only for Area Director approval. Moreover, there is nothing in the record to suggest that either Nix or BIA represented to Bitonti that the Area Director had approved the gift deed. At most, the evidence suggests that BIA was willing to proceed with allowing

12/ Appellant also relies on the fact that Nix never retracted her application to gift deed Lots 7 and 8 to Bitonti in writing. There is no requirement, however, that a grantor memorialize her change of heart in writing.

Bitonti to receive HIP benefits, before being qualified to do so, in anticipation of the gift deed becoming final. Further, Appellant admits that Bitonti was orally advised within four months of the 1988 deed that Nix had changed her mind and that the gift deed was "on hold," further undermining a claim of reasonable reliance. Finally, although Bitonti constructed a house on the property in 1988, it was not at her own expense. Rather, she took advantage of federal housing benefits for which, in hindsight, she apparently was not eligible. Appellant contends that Bitonti "changed her life" position in reliance on her understanding that the gift deed either had been or would be approved by BIA, but Appellant provides no evidence that Bitonti adversely changed her position. If anything, she benefitted from a house and the practical equivalent of a life estate on Lot 7 during her lifetime, with no title, no lease, and, at most, permission from Nix to use Lot 7.

Appellant's next argument is that because the 1988 deed to Bitonti effectively conveyed title to Lots 7 and 8, the Regional Director's "retroactive deed approval" of the May 24, 1994 quitclaim deed to Edenshaw, without notice and an opportunity to be heard, unconstitutionally "took" her property interest without due process. Opening Brief at 12. Appellant argues that even if she has only an "equitable interest" in Lot 7, she is still entitled to these due process protections. Reply Brief at 9, 11.

Appellant's argument fails. The three cases Appellant relies upon in support of her contention that she was entitled to an evidentiary hearing are not applicable here. All three cases — Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Carlo v. Gustafson, 512 F. Supp. 833 (D. Alaska 1981); and Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979) — involved statutorily-created property rights that can vest based on evidence of the use and occupancy of land. In Pence, the Ninth Circuit held that an Alaska Native who meets the Alaska Native Allotment Act's requirements for "use and occupancy" on land statutorily permitted to be allotted is entitled to an allotment of that land, and that due process requires the Department of the Interior to provide "some kind of notice and some kind of hearing" before rejecting an application. 529 F.2d at 142. Applying Pence, the District Court for the District of Alaska held in Aguilar that the Department's refusal to hold adjudicatory hearings so that applicants could present evidence of their use and occupancy of the lands at issue violated the applicants' due process. 474 F. Supp. at 847. Carlo involved the Native Townsite Act's petition process, under which a Native Alaskan can seek an unrestricted deed to property based on evidence of the claim and occupancy of the applicant. There, the court held that it could not rule as a matter of law because questions of fact existed with respect to the plaintiffs' use and occupancy claim. 512 F. Supp. at 838.

Because the statutorily-created property rights at issue in Pence, Aguilar, and Carlo can vest when certain statutory requirements are met, an evidentiary hearing to establish

whether those requirements have been met is appropriate because "[t]he protection of Indian property rights is an area where the trust responsibility has its greatest force." Aguilar, 474 F. Supp. at 846. In contrast, however, this case involves a property interest that is entirely dependent on discretionary agency action — i.e., BIA's decision to approve a gift deed conveyance. And no property right granted by a gift deed conveyance can vest unless and until BIA approves it. As such, the judicially-imposed requirement for an evidentiary hearing under the Alaska Native Allotment Act and the Native Townsite Act is not applicable here. 13/

Because we have concluded that BIA never approved the 1988 deed, and that no "equitable principles" apply to otherwise find that deed valid, Appellant's "property interest" assertion (equitable or otherwise) has no foundation. Accordingly, we reject these claims. 14/

Lot 7

With her reply brief, Appellant also filed a motion to stay the appeal pending her request that BIA retroactively approve the June 24, 1987 deed purporting to convey Lot 7 to Bitonti. In its response to Appellant's Motion for Stay and Remand, BIA "conceded that the Regional Director's analysis of the effect of the 1987 deed was not presented in the context of explicit consideration of retroactively approving that deed," and that BIA "is not

13/ Appellant also claims that BIA breached its "land-related fiduciary trust responsibility" to Bitonti and Appellant. Reply Brief at 8. The Board has consistently held, however, that in approving a conveyance of trust or restricted land, BIA's fiduciary duty is toward the landowner rather than the prospective recipient, even if the prospective recipient is a family member. Estate of Clifford Celestine, 26 IBIA at 228; Estate of Gillette, Sr., 22 IBIA at 138. BIA's trust duty in this case was therefore to Nix, the owner of Lots 7 and 8, and not to Bitonti or Appellant.

14/ Appellant also advances an argument that she has met all of the Alaska statutory requirements for adverse possession of Lot 7, and therefore has acquired equitable title to that lot. Because her alleged interest in Lot 7 is not relevant to deciding whether the Regional Director's decision to retroactively approve the 1994 deed to Edenshaw for Lot 8 was correct, we need not address this claim. We note, however, that a claim of adverse possession cannot run against trust or restricted lands. See Tsosie v. Navajo Area Director, 20 IBIA 108, 116 (1991).

strenuously opposed to the granting of a partial remand for the limited purpose of considering retroactive approval of the 1987 Lot 7 deed." Appellee's Response at 2, 3. Because the disposition of Lot 7 is not within the scope of this appeal, we conclude that remand is not appropriate.

We note, however, that our decision does not preclude BIA from considering whether to retroactively approve the 1987 or 1988 deed in favor of Bitonti as it applies to Lot 7. As we previously noted, a determination of the proper disposition of Lot 7 is not a necessary prerequisite to resolving the issue in this appeal — whether the Regional Director's retroactive approval of the 1994 deed to Lot 8 was proper. Although we have concluded that, as a legal matter, the 1988 deed purporting to convey Lots 7 and 8 to Bitonti was invalid for lack of BIA approval, and no one disputes the Regional Director's determination that the 1987 deed was similarly invalid, this does not preclude the possibility that evidence of Nix's intent could be presented that support retroactive approval of the 1987 or 1988 deed with respect to Lot 7. The Regional Director states in his decision that he would deny any request by Appellant to retroactively approve "conveyance of either or both lots to [Bitonti]," based on the evidence presented that establish that in 1989 Nix "changed her mind prior to any approval having been given, and thereafter withdrew the request for approval of any such conveyance." Regional Director's Decision at 7. But despite the evidence that Nix changed her mind with respect to gift conveying Lot 7 to Bitonti in 1989, after 1989 there is very little evidence in the record about Nix's intent with respect to Lot 7. 15/ It is possible that there is evidence concerning Nix's intent after 1989 with respect to Lot 7 that was not considered by BIA in considering Edenshaw's request regarding Lot 8. Therefore, our decision does not preclude BIA from considering, at Appellant's request, whether to retroactively approve the 1987 or 1988 deed as it applies to Lot 7. Before making such a decision, BIA should allow interested parties, including Appellant, to submit evidence they consider relevant.

15/ The only exception is Nix's ambiguous reported statement in 1990 that she "doesn't want to do anything — especially nothing that will upset Rose [Bitonti]." Oct. 3, 1990 BIA contact report.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's June 17, 2004 decision retroactively approving the 1994 deed to Edenshaw.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge